Supreme Court, U.S.
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No. 87-263 (2)

IN THE SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1986

PEOPLE OF THE STATE OF MICHIGAN
Petitioner,

v.

BERNICE JOHNSON,
Respondent.

ANSWER IN OPPOSITION TO PETITION TO WRIT OF CERTIORARI TO THE MICHIGAN COURT OF APPEALS

Lower Court Entitlement:

PEOPLE OF THE STATE OF MICHIGAN

v.

BERNICE JOHNSON

Detroit Recorder's Court No. 80-1745
Michigan Court of Appeals No. 70202
Michigan Supreme Court No. 78031

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QUESTION PRESENTED FOR REVIEW

Should Michigan appellate courts be affirmed in their exclusion of evidence where police entered Respondent's home on a pretext, without search warrant or consent and in violation of state statute, to serve an arrest warrant upon an invitee, and further searched without cause or justification after arrest?

ANSWER IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI TO MICHIGAN COURT OF APPEALS

NOW COMES Respondent, BERNICE JOHNSON, through her attorney, DOMNICK J. SORISE, and respectfully requests that this Honorable Court deny writ of certiorari to review the judgment and opinion of Michigan Court of Appeals entered in this case on November 4, 1985, and rehearing denied on December 23, 1985; and the judgment and order of Michigan Supreme Court leave to appeal granted on June 24, 1986, and order granting leave to appeal vacated and leave to appeal denied on June 17, 1987.

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OPINIONS BELOW

Opinion of Michigan Court of Appeals is reported at 146 Mich App 705; 381 NW2d 791 (1985), and contained in Petition for Writ of Certiorari as Appendix A (1a-10a).

Order of Michigan Court of Appeals is unreported under Docket No. 70202, and contained in Petition as Appendix B (11a-13a).

Order of Michigan Supreme Court granting leave to appeal is reported at 425 Mich 872; ____ NW2d ____ (1986), and contained in Petition as Appendix C (14a-17a).

Order of Michigan Supreme Court, after briefing and oral argument, vacating order granting leave to appeal and denying leave to appeal is reported at 428 Mich 902; ____ NW2d ____ (1987), and contained in Petition as Appendix D (18a-20a).

Additionally, the oral findings of fact and verdict of the trial court were transcribed under Detroit Recorder's Court No. 80-1745, and are contained in this Answer in Opposition to Petition in Appendix (A1-A2).

STATEMENT OF JURISDICTION

Respondent does not disagree with Statement of Jurisdiction as made by Petitioner.

CONSTITUTIONAL PROVISIONS INVOLVED

Respondent does not disagree with constitutional provisions involved as made by Petitioner.

STATEMENT OF CASE

At preliminary examination and again at evidentiary hearing on motion to suppress evidence, Respondent Bernice Johnson objected to police entry and search of her home to serve an arrest warrant on an invitee, Joseph Junior Foster, who was later charged and convicted as a co-defendant. Respondent maintained throughout the proceedings that police entry was illegal; that police used the arrest warrant for Foster as a pretext to enter and search her home; that police entry into her home was made in violation of the state knock-and-wait statute; and that police action in further searching throughout her home after arresting Foster was unjustified and unlawful.

The prosecution did not assert good faith, inevitable discovery, or any other theory of exemption from the exclusionary rule at the state trial level or in the Michigan Court of Appeals. The prosecution first asserted good faith in its application for leave to appeal to the Michigan Supreme Court, and did not assert inevitable discovery until its brief on appeal in the Michigan Supreme Court.

Respondent and Foster were found guilty as charged of possession with intent to deliver heroin [MCLA 333.7401(2)(a); MSA 14.15 (7401)(2)(a)] in a bench trial before Honorable Vera Massey Jones in Detroit Recorder's Court. The trial judge specifically found in her rendering of the verdict that police entry into Respondent's home to arrest Foster was a "subterfuge" to search her home, but felt bound by the ruling of a pretrial judge:

> "THE COURT: Listening to the arguments has brought back the evidence, the things that I had noted. I now remember the things that I had written down primarily in my notes as being of importance. I have listened to all of the testimony, listened to all of the witnesses testify. Another Judge of this building ruled on whether or not the evidence was legally or illegally seized and I do not have the authority to change that ruling. They found that it was legally seized. I don't know what that Judge heard. He could have heard

totally different testimony than what I heard, I don't know. *I do know that based on the testimony that I heard I am convinced it was subterfuge*, but it doesn't really (226) matter because I don't get to answer that question. I think the most honest witness was Officer Scott, who testified that he had to walk down the hall and look in the room before he could see the narcotics and narcotics paraphernalia. I looked at the drawing on the board and I tried to figure out myself how a person could stand a few feet in the hallway and see into this room that was off to one side. I had believed that it was impossible and Officer Scott said no, he had to walk down there and look in, and that makes sense to me, but I don't get to decide that issue. What I get to decide here is whether or not the defendants are guilty of possessing with the intent to deliver heroin." (A1-A2) (emphasis added).

Co-defendant Foster and Respondent were arrested at Respondent's home at 4226 Grayton in Detroit, Michigan on January 21, 1981. Detroit Police had obtained a felony arrest warrant for Foster four days earlier on January 17, 1981. The arrest warrant was for a narcotics offense, and Foster had apparently been released pending chemical analysis, warrant authorization, and notification.

Police assembled four cars and two crews, and went to the area of 4226 Grayton specifically to serve the arrest warrant on Foster. Police had knowledge Foster frequented the Grayton residence, and set up surveillance around the area. Police knew Foster's car.

Police also knew Foster frequented other locations and had Foster's home and work addresses. The arrest warrant itself had an address, not on Grayton, for Foster. One police officer testified that he had arrested Foster on two occasions during the previous month, but the locations of arrests were not checked in an effort to serve the instant arrest warrant on Foster.

Police testimony further established that police had the Grayton residence under surveillance on prior dates and that there

were written reports of the surveillance. Police had prior knowledge that Respondent, not Foster, owned the Grayton residence.

When Foster arrived in the area of the Grayton residence, all police units were radioed to the address. Foster appeared to be using a key for entrance, and gained entrance to the residence, as police arrived in unmarked cars. Police attributed their inability to physically prevent Foster's entrance into the residence to winter street conditions, but police did not attempt to announce their presence, order Foster to halt, or call out to Foster in any manner prior to his entrance into the residence.

Within seconds after Foster's entrance, police proceeded to the front porch of Respondent's home, opened the exterior screen door, and then pushed open the interior door. The lead officer did not recall whether police presence was announced before or after entrance. Foster testified that police forced open the interior door with a ram. Three police officers immediately entered Respondent's home and other officers quickly followed.

Foster was in the front entrance hallway within five feet of the front door and in the process of taking off his coat. All testimony indicated that Foster was not aware of police presence or activity until this point. The lead officer called Foster by name and informed him of their purpose to arrest him. Foster acknowledged and submitted with a simple "Okay". All testimony indicated that Foster presented no problem whatsoever to arrest.

The second or third entering police officer made sure the lead officer was having no difficulty, and then went down the front hallway past Foster, around to an adjacent hallway, and down that hallway a distance to a bedroom — where, his testimony indicated, the door was open and narcotics and paraphernalia were in plain view. Police secured the premises and arrested Respondent near the front hallway. An officer left to obtain a search warrant for Respondent's home and returned about an hour later with the warrant. The affidavit in support of search warrant was based entirely upon observations made by police after entry into Respondent's home and Foster's arrest (A3-A4).

Pursuant to the search warrant, police seized narcotics, paraphernalia, and other incriminating evidence, which were admitted against Respondent over objections, and resulted in conviction as charged on December 9, 1982, and in sentence of three to 20 years imprisonment on December 22, 1982.

In a split *per curiam* opinion dated November 4, 1985, the Michigan Court of Appeals reversed Respondent's conviction, holding that police entry and search of a third party (Respondent's) residence were not legal pursuant to an arrest warrant for Foster. *People* v. *Bernice Johnson*, 146 Mich App 705; 381 NW2d 791 (1985). The majority which included former Michigan Supreme Court Justice J. W. Fitzgerald sitting by special assignment, relied on *Steagald* v. *United States*, 451 US 204; 101 S Ct 1642; 68 L Ed 2d 38 (1981). The dissenting judge distinguished *Steagald* and relied on *Segura* v. *United States*, 468 US 796; 104 S Ct 3380; 82 L Ed 2d 599 (1984) as follows:

> "We can distinguish *Steagald* v. *United States*, *supra*, relied upon by the majority. In *Steagald*, there was a search of the third party's home before the warrant arrived. That did not occur here.
>
> Defendant claims that securing the premises amounted to a search. The United States Supreme Court in *Segura* v. *United States*. 468 US ____, ____; S Ct 3380, 3389; 83 L Ed 2d 599, 612 (1984), said:
>
> "We hold, therefore, that securing a dwelling, on the basis of probable cause, to prevent the destruction or removal of evidence while a search warrant is being sought is not itself an unreasonable seizure of either the dwelling or its contents."

In an order dated January 10, 1986, the Michigan Court of Appeals, "no answer in opposition thereto having been filed", denied prosecution's motion for rehearing, again over dissenting vote. Respondent was represented by appointed counsel throughout proceedings in the Michigan Court of Appeals.

On or about January 24, 1986, the prosecution filed application for leave to appeal in the Michigan Supreme Court. Appointed counsel having filed no answer in opposition, Respondent retained present counsel on or about April 18, 1986, and counsel filed answer in opposition on or about May 14, 1986.

In an order dated June 24, 1986, the Michigan Supreme Court granted prosecution leave to appea' *People* v. *Bernice Johnson*, 425 Mich 872; ____ NW2d ____ (1986). In an order dated June 17, 1987, after full briefing and oral argument, the Michigan Supreme Court vacated order granting leave to appeal and denied leave to appeal "for the reason that the Court is no longer persuaded that the questions presented should be reviewed by this Court". *People* v. *Bernice Johnson*, 428 Mich 902; ____ NW2d ____ (1987).

REASONS FOR DENYING WRIT

Police entered Respondent's home, without a search warrant or consent or exigent circumstances, to serve a four-day old arrest warrant on Joseph Junior Foster. Upon unsupported claims of self-protection, police searched Respondent's home after arrest beyond the area of arrest, and further claimed observation of contraband in open and plain view. Police subsequently obtained a search warrant for Respondent's home, based entirely upon observations after entry to Respondent's home and arrest of Foster (A3-A4).

A. THE PRETEXT

The trial judge was convinced and found that police used the outstanding arrest warrant for Foster as "subterfuge" to enter and search the home of Respondent, but felt bound by a pretrial ruling at an evidentiary hearing (A1-A2). The trial judge was not strictly bound by the pretrial ruling under state law because she was privy to a more extensive record at trial. See, *People* v. *Alajos*, 397 Mich 629, 634-635; 246 NW2d 828 (1976); *People* v. *Sacorafas*, 76 Mich App 370, 373-374; 256 NW2d 599 (1977). Clearly, "[a]n arrest may not be used as a pretext to search for evidence". *United States* v. *Lefkowitz*, 285 US 452, 467; 52 S Ct 420; 76 L Ed 877 (1932); *People* v. *Gonzales*, 356 Mich 247, 257; 97 NW2d 16 (1959).

In light of prior police investigation, knowledge, familiarity and positioning, along with their number, prosecution claim that police were physically unable to make Foster aware of their presence and purpose before he parked his car, walked to Respondent's home and entered her home with the use of a key, is simply untenable. See, *United States* v. *Becker*, 485 F2d 51, 53-59 (6th Cir, 1973) (McCree, CJ, dissenting). It does not take much to conclude, as the trial judge did, that police harbored suspicions about Respondent's home, had a desire to enter and search the home, and waited for Foster to enter the home to execute an outstanding arrest warrant on him. This threshold problem of pretext was raised throughout the proceedings below, but is not addressed or mentioned by the prosecution in its petition to this

Court. Pretext undermines, if not destroys, the various claims of good faith law enforcement and sweeping benefits sought by the prosecution. Pretext is also adequate and independent ground to deny certiorari under state or federal jurisprudence.

B. UNLAWFUL POLICE ENTRY

As devastating as facts and factual findings of pretext may be to the prosecution, such is not necessary to find that police entry into Respondent's home without a search warrant to arrest Foster and their subsequent search and seizures from her home after arrest of Foster, were illegal. This case does not "skirt around the edges of all existing precedents of this Court", as presented by the Petition, at p. 13. Police action in this case crossed a clearly marked line and violated established precedent. This court stated "the Fourth Amendment has drawn a firm line at the entrance to the house", in specifically holding that a search warrant was additionally required to authorize police entry into the home of another to arrest the subject of an arrest warrant. *Steagald* v. *United States*, 451 US 204, 212; 101 S Ct 1642, 68 L Ed 2d 38, (1981). A "significant potential for abuse" was outlined by this Court and recognized by the government. Police could employ an arrest warrant for one individual to "search all the homes of that individual's friends and acquaintances" or "as the pretext for entering a home in which the police have a suspicion, but not probable cause to believe, that illegal activity is taking place". *Stegald* v. *United States*, supra at US 215-216 (citation, footnote omitted).

Police acted illegally by pushing or ramming in the door to Respondent's home, and then entering or invading her home without a search warrant. Abuse visualized was realized in the factual findings of the trial judge (A1-A2). These violations, in turn, led to further police claims (need to assist fellow officer, need to protect fellow officer) and greater invasions (around corner, down hallway, to bedroom, and then throughout the home). And, so it goes. It takes not leaps and bounds. Constitutional rights in one's own home can be violated and eroded just as surely by inching maneuvers. Mr. Justice Bradley warned long

ago that it is "silent approaches and slight deviations" from which "illegitimate and unconstitutional practices" become established. *Boyd* v. *United States*, 116 US 616, 635; 6 S Ct 524; 29 L Ed 746 (1886).

It may be difficult for police to understand and accept that they cannot arrest an individual on an outstanding arrest warrant merely because the individual is five feet inside the closed door of another's home. However, it must be understood and accepted that police cannot create the circumstances, force an exigency, and then cry need. See, *United States* v. *Hare*, 589 F2d 1291, 1295 (6th Cir, 1979); *United States* v. *Thompson*, 700 F2d 944, 950 (5th, Cir, 1983).

Any reliance by the prosecution on *Segura* v. *United States*, 468 US 796; 104 S Ct 3380; 82 L Ed 2d 599 (1982) is misplaced because the case is clearly distinguished. This Court initially noted that the district court and the court of appeals both ruled that "the initial warrantless entry, and the limited security search were not justified by exigent circumstances and were therefore illegal", and accordingly narrowed the issue to whether the evidence, not observed in plain view during the initial entry but discovered upon the subsequent search warrant, was obtained by sufficiently distinguishable means to be purged of the prior illegality. *Segura* v. *United States*, supra at S Ct 3384-3386. This Court held that the subsequent search warrant was so purged because "the information which the warrant was secured" came "from sources wholly unconnected with the entry and was known to the agents well before the initial entry". *Segura* v. *United States*, supra at S Ct 3391. Here, the affidavit in support of search warrant was based entirely upon information obtained by the initial illegal entry (A3-A4).

C. STATUTORY VIOLATION

Police entry was also illegal because police did not knock, announce presence or wait for a response before pushing or breaking their way through the door into the home of Respondent, in violation of the state statutory mandate of MCLA 764.12; MSA 28.880. It matters not whether police pushed open an

unlocked door or crashed the door with a ram because such statutes, designed to incorporate fundamental values, are applicable whenever police enter without valid permission. *Sabbath* v. *United States*, 391 US 585, 586-590; 88 S Ct 1755; 20 L Ed 2d 828 (1968). Considering also that "reduction of potential violence to both occupants and police arising from the unannounced entry" is one rationale underlying knock-and-wait statutes [*State* v. *Coyle*, 95 Wash 2d 1; 681 P2d 1256, 1258 (1980)], it would not be, as asserted by the Petition, at p. 18, "unreasonable — and potentially dangerous — to require them to stop mid-way through an attempted apprehension".

Moreover, the record establishes no exigent circumstances justifying police failure to comply with statute. Police had no reason to believe that Foster was armed or would otherwise pose a danger. Police, having arrested Foster on two occasions during the previous month, offered no tales of danger, resistance, or difficulty. Police offered no reason to believe that there were narcotics at the residence or any evidence of other crimes which would be in danger of destruction upon an announcement for entry. There was certainly no immediacy as the arrest warrant for Foster was four days old, and the charged offense probably older if Foster were released to appear pending notification of chemical analysis and warrant authorization, as is customary on narcotics arrests. Additionally, the record does not establish that "facts known to officers would justify them in being virtually certain that the petitioner already knows their purpose so that an announcement would be a useless gesture". *Miller* v. *United States*, 357 US 301, 310; 78 S Ct 1190; 2 L Ed 2d 1332 (1958). Indeed, the Petition, at p. 10, concedes "the record suggests Foster was unaware that the police were trying to apprehend him". This concession, along with the circumstances surrounding the warrant itself, would appear to undercut the hints of hot pursuit.

D. FURTHER UNWARRANTED POLICE ACTION

Over and above these transgressions, police entry and movement in Respondent's home should have stopped in the front hallway area where Foster was very cooperative and posed no

problem, according to all accounts by the police who arrested him. "None whatsoever" was the characterization given by the lead officer upon being asked whether Foster posed any difficulty during the arrest. Extended movement by police throughout Respondent's home was not justified by claims to secure the immediate area or to conduct a protective sweep, because there was a failure to show a strong and demonstrable potentiality for danger. *United States* v. *Morgan*, 743 F2d 1158, 1161-1162 (6th Cir, 1984). General statements about the danger of narcotics trafficking were not presented at the trial level, and are not sufficient after-the-fact. *United States* v. *Hatcher*, 680 F2d 438, 444 (6th Cir, 1982). Protective sweep measures constitute searches within the meaning of the Fourth Amendment. *Hester* v. *United States*, 265 US 5; 44 S Ct 445; 68 L Ed 898 (1924).

E. BELATED, UNSUPPORTED EXEMPTIONS

Exemption by means of inevitable discovery or good faith should not be allowed because such claims were not properly raised below. *Steagald* v. *United States*, supra at US 208-211. Further, inevitable discovery is not supported by a record which shows that police did not actively pursue a search warrant prior to illegal entry into Respondent's home. *United States* v. *Satterfield*, 743 F2d 827, 846 (11th Cir, 1984). Nor is good faith or abrogation of the exclusionary rule supported by a record which contains a finding of subterfuge by police.

CONCLUSION

For the above reason, Respondent respectfully requests that this Honorable Court deny Writ of Certiorari in the above case.

Respectfully submitted,

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Dated: September 11, 1987

RESPONDENT'S APPENDIX

FINDINGS AND VERDICT OF TRIAL COURT

THE COURT: Listening to the arguments has brought back the evidence, the things that I had noted. I now remember the things that I had written down primarily in my notes as being of importance. I have listened to all of the testimony, listened to all of the witnesses testify. Another Judge of this building ruled on whether or not the evidence was legally or illegally seized and I do not have the authority to change that ruling. They found that it was legally seized. I don't know what that Judge heard. He could have heard totally different testimony than what I heard, I don't know. I do know that based on the testimony that I heard I am convinced it was subtefuge, but it doesn't really (226) matter because I don't get to answer that question. I think the most honest witness was Officer Scott, who testified that he had to walk down the hall and look in the room before he could see the narcotics and narcotics paraphernalia. I looked at the drawing on the board and I tried to figure out myself how a person could stand a few feet in the hallway and see into this room that was off to one side. I had believed that it was impossible and Officer Scott said no, he had to walk down there and look in, and that makes sense to me, but I don't get to decide that issued. What I get to decide here is whether or not the defendants are guilty of possessing with the intent to deliver heroin.

Now, it's been a lot of evidence introduced in this case. I think one of the most telling things besides the narcotics was the exhibit. I don't know the number now because I don't have my notes, but there was a large cardboard box brought into this courtroom and when the officer opened that box I could see puffed up coin envelopes, a large number of them, I mean a whole lot more than 50 or 60 coin envelopes. I cannot believe that if the police wanted to frame somebody that they would go through that much trouble, that is too many coin envelopes for them to fool around and puff up. Therefore, it becomes quite obvious that the person intended to use those envelopes, whoever was in possession of the heroin to distribute the narcotics, that is to deliver (227)

narcotics. So the question comes down to who in fact was in possession and control of the items found.

Miss Bernice Johnson is obviously the owner of the home, she was in possession and control of the home. She would have had to know what was in her home. And we are suddenly led to believe there was a whole lot of people coming in and out of there. This was a single residence, as I understand it, and from the testimony there might have been a workman there, there might have been people coming in for a party, but the testimony evidences that Bernice Johnson lived there, she was in possession and control of the premises, she was therefore in possession and control of the narcotics and intended to deliver that heroin.

The real question becomes Mr. Foster's role. Mr. Foster opened the door with a key. He admits he has the right to come and go as he pleases, he has full run of the premises, he is there on a lot of occasions, a large number of occasions. He knows there is work being done, he has cooked in the kitchen. Then he tells the story about his car and material that was found in his car, and, it doesn't ring true to me. I am convinced based on the evidence before me that Mr. Foster was in joint control and possession of this heroin with Miss Johnson, and they both intended to deliver same. They are guilty as charged. There will be a remand in this case.

Search Warrant

SEARCH WARRANT

State of Michigan

SS

County of Wayne

TO THE SHERIFF OR ANY PEACE OFFICER OF SAID COUNTY:

On this day Henry C. Scott, affiant, having subscribed and sworn to an affidavit for a Search Warrant, and I having under oath examined affiant, am satisfied that probable cause exists;

THEREFORE, IN THE NAME OF THE PEOPLE OF THE STATE OF MICHIGAN, I command that you search the following described place: The entire premises of 4226 Grayton. 4226 Grayton is described as a single story brick ranch type dwelling. 4226 Grayton is located on the East side of Grayton and is the fifth (5th) building South of Waveney and is located in the City of Detroit, County of Wayne, State of Michigan.

to seize, secure, tabulate and make return according to law the following property and things:

Heroin, any other controlled substances, and any items used in the sale, distribution or manufacture of any controlled substances and any items or papers indicating proof of ownership or residence or control of the above described premises, and any suspected narcotic proceeds.

The following facts having been sworn to by affiant in support of the issuance of this Warrant:

1. The affiant is a member of the Detroit Police Department working in conjunction with other members of the Detroit Police Narcotic Section regarding the arrest of one Joseph Junior Foster on outstanding felony arrest warrant #81-00344 for VCSA.

2. The affiant and other officers observed Mr Foster enter the above described premises of 4226 Grayton by using a key. The

affiant went to the front door knocked on same and rang the door bell. After a short time and receiving no responce at the door the affiant opened the door which was ajar. The affiant observed Mr Foster standing in the hallway directly in front of the door. The affiant instructed Mr Foster not to move and the affiant approached Mr Foster and informed him that he was under arrest for VCSA and affiant showed Mr Foster the warrant number. The affiant was advising Mr Foster of his rights when Sgt Piersante told the affiant to wait a minute because what appeared to be cutting and packaging materials were visible in an adjacent room to the hallway inwhich we were standing. Sgt Piersante could see into the open doorway and observed two (2) boxes one of which contained a LARGE amount of opened and ready for packaging manila coin envelopes, stamp pad, stamp (of a human eye), scale, mixer, glass cutting board with what appeared to be a powdery substance on the surface and what appeared to be a number of already sealed coin envelopes. Sgt. Piersante ordered the premises secured pending the issuance of a search warrant.

ISSUED UNDER MY HAND THIS 21st DAY OF January 1981.

/s/ DALTON A. ROBERSON
RECORDERS COURT FOR THE
CITY OF DETROIT